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No. 07-74

In the

Supreme Court of the United States

WINE & SPIRITS RETAILERS, INC., et al.,

Petitioners,

v.

RHODE ISLAND AND
PROVIDENCE PLANTATIONS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The First Amendment restricts the power of states to abridge the freedom of speech, including speech associated with commercial transactions. Rhode Island law prohibits lawful alcohol retailers from joining together in "coordinated or common advertisement[s]," or "marketing strategies," or from using any common "term or name" which might identify the stores as a common entity. R.I. Gen. Laws § 3-5-11(b)(iii)-(vi). May the state ban such expressive activity consistent with the First Amendment?

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Bezanson, Randall P., *Speaking Through Others' Voices:. Authorship, Originality, and Free Speech*, 38 Wake Forest L. Rev. 983 (2003) 7

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Farber, Daniel A., *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372 (1980) ... 14

Goldstein, Thomas C., *Nike v. Kasky and the Definition of "Commercial Speech"*, 2003 Cato Sup. Ct. Rev. 63 (2003) 15

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Howard, Alan, *The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression*, 14 UCLA Ent. L. Rev. 47 (2007) 16

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La Fetra, Deborah J., *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004) 1, 8, 15, 17

Nimmer, Melville B., *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 Hastings L.J. 639 (1975) 10

Post, Robert, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000) 13-14

Postrel, Virginia, *The Substance of Style: How the Rise of Aesthetic Value Is Remaking Commerce, Culture, and Consciousness* (2003) 5

Sandefur, Timothy, *Rights Are a Seamless Web*, 26 Rutgers L. Rec. 5 (2002) 1

Smolla, Rodney A., *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777 (1993) 6

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Swann, Jerre B., Sr., et al., *Trademarks and Marketing*, 91 Trademark Rep. 787 (2001) 5

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF has defended the freedom of entrepreneurs and commercial enterprises to express themselves. To that end, PLF has represented litigants and appeared as amicus curiae in many important cases involving commercial speech, including *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986); *City of Indio v. Arroyo*, 191 Cal. Rptr. 565 (Cal. Ct. App. 1983). PLF attorneys have also published articles on the free speech rights of those engaged in commercial enterprise. *See* Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *Rights Are a Seamless Web*, 26 Rutgers L. Rec. 5 (2002). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

This Court should grant certiorari to clarify the scope of constitutional protection for expression relating to commercial enterprise. At present, it is unclear what expression receives

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

constitutional safeguards, and what level of protection it does receive.

These questions are especially important in connection with common brand identities and joint marketing schemes. Commercial speech doctrines developed in previous decades have focused on simple and direct advertising, but as marketing has become more sophisticated in recent years, and intertwined with classically protected forms of expression, such a focus has rendered the case law outdated. While those decisions involved direct descriptions of items for sale at particular prices, modern marketing techniques involve the development of complicated "brand identities" and "corporate personalities," in which consumers are not merely interested for the opportunity of engaging in transactions, but in which they and sellers combine in common expressive activities.

Certiorari should be granted to make clear that common branding and the use of coordinated identifying marks by commercial enterprises is constitutionally protected expression.

The court of appeals found that Petitioners lacked standing to assert violations of both their First Amendment rights and the First Amendment rights of their franchisees. Because standing is of concern particularly in this Court's consideration of certiorari, amicus also addresses the merits of the standing issue. Petitioners have standing to assert their own rights because they are not merely engaged in the nonexpressive activity of furnishing the materials of expression; rather, they are engaged in a common expressive enterprise with franchisees, which itself merits First Amendment protection.

Like businesses that operate highway billboards, *cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), or bookstores, *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002), Petitioners have expressive rights that are inextricably connected to their business activities. Petitioners also have standing to assert their franchisees' expressive rights. Such a

challenge is not properly characterized as an "overbreadth" challenge in the commercial speech context—as the court of appeals concluded, *see Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005). Instead, Petitioners have a "'commercial interest' in protected speech." *Metromedia*, 453 U.S. at 504 n.11. The expression by franchisees is protected expression, and even if Petitioners' activity is characterized as commercial speech, they have the right to challenge this law on the basis of its effects on the constitutionally protected expression of franchisees.

ARGUMENT

I

THIS COURT SHOULD GRANT CERTIORARI TO DECLARE THAT COMMON BRANDING IS CONSTITUTIONALLY PROTECTED EXPRESSION

As Petitioners note, this Court has yet to decide whether trade names and signs are commercial speech or noncommercial speech. Pet. for Cert. at 22. This is an important matter which deserves attention by the Court. Indeed, it indicates the vagueness and confusion that surrounds the entire distinction between commercial and noncommercial speech and that calls for wholesale revision of this area of the law.

Branding, or the use of trade logos, is valuable to businesses because it allows customers to predict the quality of services or goods that they can expect to receive from a business. Customers who pay more for a big label are paying for the convenience of not having to shop around for the best quality; they can tell from the brand name whether the product is a high quality, long-lasting, value-retaining product, or whether it is a low-quality, disposable item. Common branding therefore, while it does not explicitly propose a transaction, expresses "truthful, nonmisleading commercial messages" to

the public. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

This is particularly the case with regard to franchises. The ability to express important messages to the public is of the *essence* to the concept of a franchise—which in a large sense means the sale of an image or a communicative abstraction to franchisees. *See* Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 55 (2006) ("the main advantage of franchising . . . arises from its unique combination of (1) the chain's comparative advantages in creating brand recognition and capturing economies of scale in production, product development, and advertising with (2) the independent entrepreneur's drive and knowledge of the local market."). The old saying "the medium *is* the message" is very much true of franchises. *See* Roberta Rosenthal Kwall, *Regulating Trademarks on Exterior Signs: Should Local Law Trump the Lanham Act and the Constitution?*, 71 S. Cal. L. Rev. 1105, 1164 n.266 (1998) ("Trademark ownership entails control over a message that flows from producer to consumer. This message is short, but nonetheless rich with information.").

The "Ben & Jerry's" brand, for example, which has over 650 ice cream franchises in the United States, is not merely in the business of providing its franchisees with ice cream and other foodstuffs; nor is it in the business of selling a medium of expression to its dealers. Rather, it combines the two by allowing dealers and customers to participate in a *common expressive enterprise*: to share in a brand identity. It is, in a way, selling good will, which has value *solely* because it communicates to customers an idea of the quality of services and products available at the dealer. Customers know by the distinctive appearance of any Ben & Jerry's dealer what they can expect of a commercial transaction there, even if they have never entered that store before. Thus the franchise is by nature inextricably connected to the communicative content of the

logo or other brand identifying marks. The provision of licensing services *is* speech, because it is those services that allow the franchise owner to express a message to the public. That message, moreover, is not exclusively articulated by the franchisor or the franchisee, but by both.

The message expressed by common branding marks is *not* solely a message inviting a commercial transaction. *Cf. 44 Liquormart*, 517 U.S. at 501 ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) ("[T]he Government should not be able to suppress . . . truthful speech merely because it happens to appear on the label of a product for sale.").

Instead, as marketers have long understood, a "strong brand" image conveys "a value proposition that taps into consumer needs and leads to a relationship that drives purchasing decisions. A value proposition is a statement of the functional, emotional and self-expressive benefits delivered by a brand, and the strongest brands fuse all three." Jerre B. Swann, Sr., et al., *Trademarks and Marketing*, 91 Trademark Rep. 787, 796-97 (2001). Customers receive these messages and understand them not only as indicators of quality, but as part of an collective expressive enterprise in which they can participate. Thus, they can express themselves as well. *See* Virginia Postrel, *The Substance of Style: How the Rise of Aesthetic Value Is Remaking Commerce, Culture, and Consciousness* 103 (2003) (people "define [them]selves aesthetically . . . . *I like this* becomes *I'm like this*.").

A person wearing a T-shirt with a logo on it is often expressing a message more than mere brand loyalty. *See* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 Notre Dame L.

Rev. 397, 397 (1990) ("ideograms that once functioned solely as signals denoting the source, origin, and quality of goods have become . . . valued as indicators of the status, preferences, and aspirations of those who use them."). "'[L]ifestyle' advertising is certainly a significant, and maybe even the dominant, part of modern advertising . . . . The instant one recognizes . . . that modern advertising is multidimensional, the task of designing coherent First Amendment policies for such advertising becomes problematic." Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 800 (1993).

Recurring to the previous example, the Ben & Jerry's corporation has established a reputation for social and political activism. It has carefully nurtured a corporate image that "focuses on community involvement and the firm's status as a socially responsible business." Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 Wash. & Lee L. Rev. 1625, 1645 (1993). A consumer who wears a tie-dyed Ben & Jerry's T-shirt, therefore, is choosing to express her association with the brand's image of "social conscience." Matt Haig, *Brand Royalty: How the World's Top 100 Brands Thrive & Survive* 168 (2004). Franchisees share in the same expression. The Ben & Jerry's Corporation invites potential franchisees to join in "our shared commitment to operate in a socially responsible way" and requires them to "activat[e] the brand and social mission through community involvement." Ben & Jerry's Website, Franchise Opportunities and FAQs.[2]

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[2] *Available at* http://www.benjerry.com/scoop_shops/franchise_info/ and http://www.benjerry.com/scoop_shops/franchise_info/faqs.cfm (both last visited Aug. 14, 2007).

The First Amendment clearly protects noncommercial conduct by which a person makes an aesthetic choice intended to express solidarity with others—such as growing one's hair long, *Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993), or wearing black armbands, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), or identifying clothing, *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461 (C.D. Cal. 1993), or a religious symbol as a necklace, *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997), or displaying a symbol or logo, *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), or even simply standing or sitting, *see Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 306 (1984).

This is because people express themselves through identification with others. *See generally Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-70 (1995). They express a message of solidarity when they wear the same clothing or the same color or choose the same hairstyles. The First Amendment generally covers such conduct even though it does not express a "particularized message." *Id.* at 569. Certainly such expressive conduct deserves at least as much constitutional respect as the "erotic . . . expression" recognized by this Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 318 (2000). "In short, a cultural, ritualistic theory of communication values expressive activity for the kind of comment it makes about the relationships between culture and society, or between expressive forms. It values the ways in which 'experience is worked into understanding and then disseminated and celebrated.'" Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 Wake Forest L. Rev. 983, 1010 (2003) (citation omitted).

Yet the court below determined that because the Petitioners are not explicitly proposing a commercial transaction, their business of fostering collective branding and the use of shared identifying marks receives *no* protection under the First Amendment. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 7 (1st Cir. 2007) (reaffirming earlier holding that "[t]he provision of advertising and licensing services is not speech that proposes a commercial transaction and therefore does not constitute commercial speech." *Wine & Spirits Retailers*, 418 F.3d at 49).

In other words, the display of a symbol is covered by the First Amendment, as is the conveyance of information such as an advertisement. So, too, is conduct intended to express solidarity with a group, conduct that does not convey a particularized message, or that conduct involves only an ineffable aesthetic experience. Finally, the proposal of a commercial transaction is protected by the First Amendment. But Petitioners' conduct, which *combines all of these things*, is not. This indicates the conceptual confusion at the center of today's commercial speech jurisprudence.

Moreover, in the increasingly complicated contemporary economy, commercial messages are routinely intertwined with noncommercial messages in a way that makes analysis by present commercial speech mechanisms virtually impossible. *See generally* La Fetra, *supra*, at 1230-36 (music videos, product placement, sponsorships, and other marketing tactics make it increasingly difficult to separate commercial from noncommercial speech).

The petition should be granted to redress this confusion and set forth clear, predictable standards for determining what expression receives and what does not receive constitutional protection.

II

THE PETITIONERS HAVE STANDING TO ASSERT A FIRST AMENDMENT VIOLATION

The Court of Appeals rejected Petitioners' free speech arguments on the grounds that they lacked standing. Since standing is an important consideration on a petition for certiorari, *see, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (per curiam); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (mem) (dismissal of certiorari appropriate where parties lack standing), amicus will address the merits of Petitioners' standing arguments.

A. The Court of Appeals' Assertion That Expressive Conduct Is an "Act," Not Speech, Threatens the Expressive Freedom of Franchise Companies

The court of appeals held that Petitioners' conduct is an "act," and not "speech": that is, that Petitioners provide expressive services and materials, and do not engage in speech themselves. Therefore, Petitioners had no First Amendment rights at stake which they could assert here. "The provision of advertising and licensing services" the court declared, "is not speech that proposes a commercial transaction and therefore does not constitute commercial speech." *Wine & Spirits Retailers*, 418 F.3d at 49.

This conclusion is flawed for three reasons.

First, the distinction between a business which furnishes expressive opportunities and a business engaged in speech itself is not clear enough to allow for principled decision-making. This Court has frequently relied on the First Amendment to strike down restrictions on commercial pursuits that might be read as service industries or the sale of goods rather than communicative conduct. *See, e.g., Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936); *Minneapolis Star & Tribune Co.*

v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In an area of the law—commercial speech—that is already full of almost incomprehensibly narrow distinctions, adopting a legal rule that confines free speech rights to those who make use of communicative services, but excluding those who provide such services, would only further complicate matters. And with regard to franchises, which are in the business of selling participation in a common communicative enterprise, this is a particularly difficult line to draw. *Cf. Kasky v. Nike, Inc.*, 45 P.3d 243, 269 (Cal. 2002) (Brown, J., dissenting) ("the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries."). For a state to restrict an expressive enterprise such as a franchise licensing agreement is as much an interference with expression as it is a regulation of business conduct, and it "imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Second, such a distinction finds no support in the Constitution. If anything, the text of the First Amendment counsels in favor of protecting businesses that furnish expression, since it prohibits any law that abridges the freedom of speech or of the *press*, thus explicitly referring to an industry engaged in the provision of communicative services. It makes no such subtle distinctions as the First Circuit made in this case. *See generally* Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 Hastings L.J. 639, 658 (1975) (noting different scope of protection under press and speech guarantees).

Third, the court of appeals' use of the Petitioners' status as a service provider to short-circuit their First Amendment claim, is a dangerous tactic which could undermine protection

of all commercial speech. All such speech is engaged in by businesses, and to bar Petitioners' claims on the grounds that they "merely" engage in a *business* that happens to communicate, would essentially eliminate all expressive freedom for businesses.

In *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976), this Court declared that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising," yet there must also be an expressive right on the part of those who help advertisers or others to express themselves.

Owners of theaters have standing to assert expressive rights even though they merely furnish the opportunity for film makers to express themselves, *see Playtime Theatres*. Book stores have First Amendment rights even though they sell books written and published by others. *Alameda Books*, 535 U.S. 425; *Wexler v. City of New Orleans*, 267 F. Supp. 2d 559, 565 (E.D. La. 2003) ("the First Amendment applies in this case because book selling is a form of expression."). Businesses that operate newspaper stands, or highway billboards, are protected under the First Amendment even if the newspapers or billboard displays contain messages by others; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Metromedia*, 453 U.S. 490. And, of course, newspaper companies themselves are protected under the First Amendment even if they print articles not produced by the newspaper company themselves; *Grosjean*, 297 U.S. 233; *Minneapolis Star & Tribune*, 460 U.S. 575.

It is not only the speaker herself who is protected under the expression clauses. If the provision of communication services or materiel can be deemed a mere business activity with no First Amendment protection, it is difficult to imagine what will remain of the expressive rights of media companies.

Moreover, as explained above, the nature of franchises is such that it is impossible to distinguish the franchisor's communicative conduct from the franchisor's sale of communicative opportunities or materials. A franchise license is a sort of communication in itself—permission to use a symbol which expresses a message about the franchisee, the content of which has meaning because of the *franchisor's* activities. Courts can no more distinguish the sale of permission to use common trade names and symbols from the expressive content *of* those symbols, than they can distinguish Paramount Pictures' sale of film stock from the images that appear on that film stock, or the newsprint sold by the Minneapolis *Star-Tribune* from the information that is printed on that paper. To characterize a franchise licensing agreement as only the sale of a service or product, not containing any constitutionally protected expression, is to make the same dubious distinction. This Court should take this opportunity to end such failed attempts at line-drawing.

B. Petitioners Have Standing to Raise Challenges to Restrictions on Expressive Rights of Its Franchisees

The court of appeal reaffirmed its earlier finding that Petitioners lacked standing to assert First Amendment rights on behalf of franchises whose expressive rights were being violated. *See Wine & Spirits Retailers*, 418 F.3d at 49; *Wine & Spirits Retailers*, 481 F.3d at 6 (finding "no reason to revisit" earlier rejection of standing). It explained that the overbreadth doctrine is inapplicable in commercial speech cases and therefore that the Petitioners could not assert that the challenged laws infringed on the free speech rights of others.

However, as this Court declared in *Metromedia*, 453 U.S. at 504 n.11, such a holding confuses the category of commercial speech with the category of parties "who have a 'commercial interest' in protected speech." This Court noted that it has

"never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." If that were the law, "newspapers, radio stations, movie theaters and producers—often those with the highest interest and the largest stake in a First Amendment controversy—would not be able to challenge government limitations on speech as substantially overbroad." *Id.*

The same analysis applies here. Assuming *arguendo* that Petitioners are nothing more than a conduit or service industry assisting others to express themselves, Petitioners still have a commercial interest in the protected speech of franchisees, and therefore are able to allege that a law unconstitutionally infringes on speech by others, so long as they can establish some injury of their own which is fairly traceable to the government's actions. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners have done so. *See Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 211 (D. Mass. 2006) (finding it "clear" that franchisor had standing to assert First Amendment rights of franchisee when law created "an insurmountable obstacle to the approval of th[e] franchise agreement."). The Rhode Island law has injured Petitioners' business of providing communicative opportunities, services, and materials. Standing thus established, they may also contend that the law unconstitutionally infringes on the expressive rights of others.

This Court has held that the overbreadth doctrine is not applicable to the commercial speech context, *see Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-381 (1977),[3] but it has not

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[3] Moreover, the holding that overbreadth does not apply in commercial speech cases is questionable. *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 28-32 (2000). As Professor Post notes, the rejection of

(continued...)

rejected overbreadth challenges where a party, who alleges violation of a constitutionally protected right, asserts the infringement of expression by others. In *Bates*, a party whose commercial speech was regulated challenged the law on the grounds that it would restrict the commercial speech rights of others. But in *Metromedia*, the Court found that the owners of a billboard who had a commercial interest in expression on the billboards, did have standing "to raise the argument that billboards may, for some individuals or groups, be the only affordable method of communicating to a large audience." 453 U.S. at 504 n.11.

In *Preferred Commc'ns, Inc. v. City of L.A.*, 754 F.2d 1396 (9th Cir. 1985), *aff'd* 476 U.S. 488 (1986), the Ninth Circuit Court of Appeals relied on *Metromedia* to reject the argument that cable franchise operators could assert First Amendment rights in challenging a local government's rejection of a franchise license and refusal to allow the company to use government-owned poles for its cable lines. The court of appeal held that "cable operators do transmit programs produced by others," but that they "would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promotors [sic]." 754 F.2d at 1410 n.10. This Court affirmed, holding that cable franchises "partake[] of some of the aspects of speech and the communication of ideas as do

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[3] (...continued)
overbreadth doctrine in commercial speech cases rests on the assumption that commercial speech is less likely to be chilled by overly broad regulations than are other types of speech, but "the empirical basis of even such a tepid generalization is quite shaky." *Id.* at 32. *See also* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 386 (1980) ("The existence of a chilling effect depends as much on the potential penalty as on the motivation for the speech. A five dollar fine in a political speech case is probably less of a deterrent than a jail sentence—or disbarment—in a commercial speech case.")

the traditional enterprises of newspaper and book publishers," 476 U.S. at 494. Thus the fact that a business provides the material or conduit of expression by others does not mean that it has no First Amendment interest in that expression, or that it can be regulated in a way that restricts the flow of information.

Where, as in the case of franchises, the nature of the business is inseparably bound up with the communicative enterprise, it makes no sense to declare that the franchisor is engaged merely in an activity rather than in expression, and thereby to declare that the business lacks standing. Petitioners have standing to pursue this case.

III

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFUSING AND CONTRADICTORY PRECEDENT REGARDING COMMERCIAL SPEECH

Commercial speech doctrine is in such disarray that legal experts are unable to describe it with any degree of confidence. Indeed, in the past quarter century, this Court has not only "articulated three inconsistent tests for identifying 'commercial speech,' generating substantial uncertainty and confusion regarding the boundaries of commercial speech," Thomas C. Goldstein, *Nike v. Kasky and the Definition of "Commercial Speech"*, 2003 Cato Sup. Ct. Rev. 63, 70 (2003), but it has also provided a dizzying array of standards of scrutiny for commercial speech cases. *See* La Fetra, *supra*, at 1215-16.

In 1942, this Court declared that commercial speech received no First Amendment protection, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), then in 1976 that it was entitled to very serious protection. *Va. State Bd. of Pharmacy*, 425 U.S. at 761-62. Four years later, the court devised a four-part test for scrutinizing restrictions on commercial speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*,

447 U.S. 557, 564 (1980), then revised that test, *44 Liquormart*, 517 U.S. at 504. Depending on the speaker and the message conveyed, this Court has produced inconsistent rulings in similar cases. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (allowing regulation of commercial expression by attorneys); *Bates*, 433 U.S. at 384 (disallowing regulation of commercial expression by attorneys).

Worse yet, the Court has based its analysis on the alleged "social worth" of the speech at issue—contravening a cardinal First Amendment precept that speech should not receive lesser or higher protection depending on its content. *Compare Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 342, 348 (1986) (allowing restrictions on advertisements for legal gambling facilities), *with Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (disallowing restrictions on solicitations for charity). *See also* Alan Howard, *The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression*, 14 UCLA Ent. L. Rev. 47, 88 (2007) (noting how courts often "do precisely what the First Amendment forbids any government official from doing: judging the social worth of the speaker's underlying message" in order to exempt speech from "the general rule against content-based regulations.").

This Court has frequently acknowledged the confusion and vagueness that surrounds current commercial speech jurisprudence. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech."); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) ("the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps."). It has also recognized that "judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on

commercial speech." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). *See also 44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring) (noting that commercial speech cases are impossible to apply "with any uniformity."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) ("several Members of the Court have expressed doubts about the *Central Hudson* analysis."). "The commercial speech doctrine as currently applied by the Supreme Court and lower courts can lead to highly unpredictable results." La Fetra, *supra*, at 1215. Yet the law continues to avoid clear distinctions and definitions. *City of Cincinnati*, 507 U.S. at 419-20.

Lower courts find it exceedingly difficult to follow this Court's pronouncements on commercial speech, as well. *See, e.g., Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) ("the *Central Hudson* test is not easy to apply"); *accord, Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998); *Kasky*, 45 P.3d at 254-55. *See also American Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 867 (3d Cir. 1984) (Adams, J., concurring) ("The commercial speech doctrine, which offers lesser protection for commercial than for non-commercial communications, has been criticized almost since its inception for its failure to develop a hard and fast definition for this type of speech.").

Certiorari should be granted in this case to redress the confusing and overlapping standards applied to commercial speech.

CONCLUSION

The petition for certiorari should be *granted.*

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Respectfully submitted,

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